TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~484.~~ 266

THE REPUBLIC INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM LURKINS, GEORGE WALLS, RICKLEFF TUTKEN, AND NATHAN ENGELMANN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED JANUARY 16, 1871.

Dec. 1871

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INDEX.

	Original.	Print.
Præcipe for summons	2	1
Summons	3	1
Acceptance of service of same	4	2
Declaration	5	2
Plea	12	5
Trial	13	5
Verdict and motion for new trial	14	6
Motion for new trial overruled and judgment entered	15	6
Bond for writ of error filed and order for supersedeas	16	7
Supersedeas bond	17	7
Bill of exceptions	18	8
Clerk's certificate	27	14
Writ of error	28	14
Citation and return	29	15

1 Circuit court of the United States for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America, for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district, on the first Monday (being the third day) of October, A. D. 1870—present the honorable Andrew G. Miller, district judge, presiding: Charles S. Hamilton, marshal; Edward Kurtz, clerk—among other, the following proceedings were had, to wit:

WILLIAM LURKINS, GEORGE WALLS, RICKLEFF Tutken, & Nathan Engelmann, plaintiffs,
vs.
THE REPUBLIC INSURANCE COMPANY, DEFENDANT. } At law.

Be it remembered that heretofore, to wit, on the 21st day of June, A. D. 1870, came the above-named plaintiffs, by their attorneys, Messrs, Emmons & Van Dyke, and filed their praecipe for a summons
2 against the above-named defendant, as follows, to wit:

Praecipe for summons.

Circuit court United States, district of Wisconsin.

WILLIAM LURKINS, GEORGE WALLS, RICKLEFF Tutken & Nathan Engelmann,
vs.
THE REPUBLIC INSURANCE COMPANY.

Let summons issue in above-entitled cause, in an action of trespass on the case upon promises, damages ten thousand dollars; returnable fourth Monday of June, 1870.
Dated June 21, 1870.

EMMONS & VAN DYKE,
Pl'ffs' Attorneys.

Whereupon a summons issued, as follows:

3 THE UNITED STATES OF AMERICA, *ss:*

SEAL. The President of the United States of America, to the marshal of the district of Wisconsin, greeting:

You are hereby commanded to summon The Republic Insurance Company to appear before the circuit court of the United States of America for the district of Wisconsin, in the seventh circuit, at the United States court-room, in the city of Madison, on the fourth Monday of June ensuing, then and there to answer unto William Lurkins, George Walls, Rickleff Tutken, & Nathan Engelmann, in a plea of trespass on the case on promises, to their damage ten thousand dollars, which shall then and there be made to appear. And of this writ make due return.

Witness, the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this twenty-first day of June, in the year of our Lord one thousand eight

hundred and seventy, and of the independence of the United States the ninety-fourth.

EDWARD KURTZ, *Clerk.*

EMMONS & VAN DYKE, *Attorneys.*

4 (Indorsed:) 110 law docket C. William Lurkins, George Walls, Rickleff Tutken, & Nathan Engelmann, vs. The Republic Insurance Company. Summons. Damages, $10,000. Filed June 21st, 1870.

Return.

We appear for defendants, & waive bond for costs.

FINCHES, LYNDE & MILLER,
Def'ts' Att'ys.

21 JUNE, 1870.

5 AUGUST 1ST, 1870.

This day came the plaintiffs, by their attorneys, and filed their declaration, as follows:

Declaration.

Circuit court of the United States for the eastern district of Wisconsin, of the fourth Monday of June, A. D. 1870.

EASTERN DISTRICT OF WISCONSIN, *ss:*

William Lurkins, George Walls, Ricklef Tutken, and Nathan Engelmann, who are citizens of the State of Wisconsin, by Emmons and Van Dyke, their attorneys, complains of The Republic Insurance Company of Chicago, a body corporate, created by, and organized under, the laws of the State of Illinois, and a citizen of said State, of a plea of trespass on the case upon promises.

For that whereas the said plaintiffs, before and at the time of the making of the policy of insurance hereinafter mentioned, were interested in the vessel called the propeller "Belle" in the proportions following, to wit, said Lurkins as owner of one-half thereof, said Walls and Tutken, each, as owner of one-fourth thereof, and said Engelmann as mortgagee, and remained so interested until, and at the time of, the loss hereinafter-mentioned, excepting that then said Englemann was interested only as mortgagee of the share of said Lurkins.

6 And whereas, also, the said defendant at the time of the making of the said policy of insurance was a corporation duly created and organized under and by the laws of the State of Illinois, pursuant to an act of the legislature of said State, entitled "An act to incorporate the Republic Insurance Company of Chicago," passed February 15, 1865, and act amendatory entitled "An act to amend an act entitled an act to incorporate the Republic Insurance Company of Chicago," approved February 15, 1865, "passed March 25, 1865," and was thereby entitled and empowered to make the contract hereinafter-mentioned.

And whereas, also, the said defendant heretofore, to wit, on the 2nd day of April, 1869, at Chicago in the State of Illinois, to wit, at the district aforesaid, in consideration of a premium for insurance, then and there agreed to be paid by said plaintiffs, Lurkins, Walls, and Tutken, to said defendant, caused to be made and delivered to them a certain policy of insurance, in writing, bearing date on that day, subscribed by its president and attested by its secretary, thereto being duly authorized, purporting thereby that the defendant, on account of the plaintiffs, Lurkins, Walls, and Tutken, by the names W'm Lurkin, George Walls, Rucklef Tutken, (loss, if any, payable to N. Engelmann (meaning the plaintiff

Engelmann) as his int. (meaning interest) might appear,) did make insurance and did cause five thousand dollars to be insured upon
7 the body, tackle, apparel, and other furniture of the propeller called the "Belle," to engage in the gen'l (meaning general) lake trade, from noon of the 1st day of April, 1869, (the said vessel being warranted by the assured to be then in safety,) to noon of the 10th day of December, 1869, unless sooner terminated or made void by conditions thereinafter expressed, but warranted by the assured to be employed exclusively in the freighting and passenger business, and to navigate only the waters, bays, harbors, rivers, canals and other tributaries of lakes Superior, Michigan, Huron, St. Clair, Erie, and Ontario, and river St. Lawrence to Quebec, usually navigated by vessels of her class during the portion of the life of said policy, *and that* between noon of April 1st, and noon of November 30th; and between noon of November 30th and noon of April 1st ensuing, said vessel should be laid up and safely moored satisfactor'y to said company; and in and by said policy, said vessel, her tackle, apparel, and other furniture were valued at twelve thousand five hundred dollars, without any further account to be given by the assured to the assurers for the same, and it was declared, touching the adventures and perils which the defendant was content to bear and take upon itself by said policy, they were of the lakes, rivers, canals, fires, jettisons that shall come to the damage of said
8 vessel or any part thereof, excepting all perils, losses, misfortunes, or expenses consequent upon and arrising from or caused by the following or other legally excluded causes, viz: Damage that might be done by the vessel thereby insured to any other vessel or property; incompetency of the master or insufficiency of the crew, or want of ordinary care and skill in navigating said vessel, and in loading, stowing, and securing the cargo of said vessel; rottenness, inherent defects, over-loading, and all other unseaworthiness; theft, barratry or robbery; charges, damage or loss in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war; any claim for wages or provisions furnished to officers or crew, while the property insured might be detained by any disaster or during subsequent repairs, excepting always services rendered in protecting, recovering, and securing the vessel or property covered by said policy; anchors being cast without being properly or sufficiently buoyed; gangways and openings through the deck being improperly or insecurely secured or protected; in and by which policy the assurers acknowledge the receipt of a note due September 15, 1869, for the amount of the consideration of said insurance, for two hundred and fifty dollars, being at the rate of five per cent on five thousand dollars and agreed that losses should be payable in sixty days, proofs of such
9 loss or damage and of the amount thereof, and proof of the interest of the assured should be made an I presented at the office of said company, (the amount of the premium, or note for premium, on said policy, if unpaid, and all other indebtedness due said company being first deducted.)

And thereupon, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, in consideration that the plaintiffs, Larkins, Walls, and Tutken, at the special instance and request of the defendant, had then and there made and delivered to the defendant their promissory note, in writing, payable to said defendant the 15th September, 1869, for the sum of two hundred and fifty dollars, as a premium or reward for the said insurance of five thousand dollars of and upon the said vessel in the said policy of insurance mentioned, and had then

and there undertaken and faithfully promised the said defendant to perform and fulfil' all things in the said policy of insurance contained on the part and behalf of the insured to be performed and fulfil'ed, the said defendant undertook, and then and there faithfully promised them, the said plaintiffs, that the defendant would become insurer to them, the said plaintiffs, of the sum of five thousand dollars upon the said vessel in the said policy of insurance mentioned, and would perform
10 and fulfil' all things in the said policy of insurance mentioned on its part and behalf, as such insurer of the said sum of five thousand dollars to be performed and fulfilled.

And the plaintiffs further in fact say that, at the time of making said policy, the said vessel was in safety, and from thence to and at the time of the happening of the loss hereinafter mentioned employed exclusively in the freighting and passenger business upon the waters of Lake Michigan and its tributaries; and the plaintiffs, on their part, had kept and performed all things in said policy by them to be kept and performed; and that, on the 20th day of November, 1869, and during the risk in said policy mentioned, the said vessel then being stout, staunch, and strong, well and sufficiently masted, manned, tackled, victualled, apparelled, and appointed, having her cargo well and sufficiently loaded, stowed, and secured, and in every respect being fit for sea, and being carefully and skillfully navigated, was, while on a voyage from the port of Manitowoc to the port of Milwaukee, upon the waters of Lake Michigan, burnt and wholly consumed and destroyed by fire, and was wholly lost to the owners and proprietors thereof, to wit, at the district aforesaid.

Of all which said several premises the said defendant after-
11 wards, and more than sixty days before the commencement of this action, to wit, on the thirtieth day of November, 1869, at the district aforesaid, had notice, and the plaintiffs then and there gave to the defendant due proofs of such loss and damage, and of the amount thereof, and of the interest of said plaintiffs, and then and there requested the defendant to pay the said sum of five thousand dollars, and which the defendant then and there ought to have paid, according to the form and effect of the said policy, and its promise and undertaking so by it made as aforesa'd, to wit, at the district aforesaid.

Nevertheless the said defendant, although often requested, &c., has not yet paid the said sum of money above mentioned, or any part thereof, to the plaintiffs, but to pay the same, or any part thereof, to the plaintiffs, the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiffs of ten thousand dollars; & therefore they bring suit, &c.

EMMONS AND VAN DYKE.
Pl'ffs' Att'ys.

And same day plaintiffs' attorneys entered in the order and rule book the following rule, to wit:

12 *Rule to plead.*

Of the first Monday of August, A. D. 1870.

WILLIAM LURKINS, GEORGE WALLS, RICKLEF Tutken, & Nathan Engelmann
vs.
THE REPUBLIC INSURANCE CO. OF CHICAGO.

On motion of Emmons & Van Dyke, plaintiffs' attorneys, ordered

that the defendant plead to the plaintiffs' declaration on file by the first Monday of September next, or its default will be entered.

EMMONS & VAN DYKE,
Plaintiffs' Attorneys.

AUGUST 22, 1870.

This day came the defendant, by its attorneys, Messrs. Finches, Lynde & Miller, and filed their plea, as follows:

Plea.

U. S. circuit court for the eastern district of Wisconsin.

WILLIAM LURKINS, GEORGE WALLS, RICKLEF Tutken, Nathan Engelmann
vs.
THE REPUBLIC INSURANCE COMPANY.

And the said defendant The Republic Insurance Company, by Finches, Lynde & Miller, its attorneys, comes and defends the
13 wrong and injury, when, &c., and says that it did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against it; and of this the said defendant puts itself upon the country, &c.

FINCHES, LYNDE & MILLER,
Att'ys for Defendant.

And now, at this same term, to wit, October term, A. D. 1870, and on the thirty-eighth day thereof, to wit, on the 21st day of November, A. D. 1870, the following proceedings were had, to wit:

Trial.

WILLIAM LURKINS, GEORGE WALLS, RICKLEFF Tutken, & Nathan Engelmann,
vs.
THE REPUBLIC INSURANCE COMPANY. } At law.

This day came the parties, by their counsel, and the issue herein came on to be tried.

Whereupon a jury was called to try the same, who came, to wit: Thomas J. Freeman, Samuel Hayt, M. C. Cook, Isaac Selleck, James R. Morris, Moses S. Scott, Frederick Wardner, William Langton, Robert Trumble, Enos Gay, George K. Gregory, and James Siddell, twelve free, honest, and lawful men of the district, who were severally sworn and empanneled; and the jurors of the jury aforesaid being charged
14 by the court retired to their room, under the charge of a sworn officer, to deliberate on their verdict, and with leave to bring in a sealed verdict to-morrow morning.

And afterwards, to wit, on the thirty-ninth day of said term, to wit, on the 22nd day of November, A. D. 1870, the following proceedings were had, to wit:

Verdict.

WILLIAM LURKINS GEORGE WALLS, RICKLEFF Tutken, & Nathan Engelmann,
vs.
THE REPUBLIC INSURANCE COMPANY. } At law.

This day came the parties, by their counsel, and the jurors of the jury aforesaid came into court with a sealed verdict, and on their said oaths, respectively, do say that the defendant did assume and promise in manner and form as the plaintiffs have herein declared against it, and assess the damages to the said plaintiffs at the sum of five thousand two hundred and ninety-one dollars and sixty-seven cents.

And came the defendants' counsel and moved the court for a new trial for reasons filed, as follows:

Motion for new trial.

Circuit court of the United States for the eastern district of Wisconsin.

15 WILLIAM LURKINS, GEORGE WALLS, RICKLEF Tutken, & Nathan Engleman,
vs.
THE REPUBLIC INSURANCE COMPANY OF CHICAGO.

Now comes the defendant, in above-entitled cause, and moves the court for a new trial in this cause, for error in the rulings of the court, and for misdirection to the jury, and for the further reason that the verdict of the jury is contrary to law and the evidence.

FINCHES, LYNDE & MILLER,
Def'ts' Att'ys.

And afterwards, to wit, on the forty-eighth day of said term, to wit, on the 5th day of December, A. D. 1870, the following proceedings were had, to wit:

Motion for new trial overruled & judg't entered.

WILLIAM LURKINS, GEORGE WALLS, RICKLEFF Tutken, & Nathan Engelmann,
vs.
THE REPUBLIC INSURANCE COMPANY. } At law.

This day came the parties, by their counsel, and the motion of the defendant for a new trial came on to be heard, and was argued by Mr. Emmons for the plaintiffs, and by Mr. Lynde for said defendant, and submitted; on consideration whereof, it is ordered by the court
16 that the said motion be, and hereby is, overruled.

Whereupon it is considered and adjudged by this court now here that the said plaintiffs do have and recover of the said defendant, The Republic Insurance Company, the sum of five thousand two hundred and ninety-one dollars and sixty-seven cents, damages so as aforesaid assessed by the jury, together with seventy-six dollars and ninety cents, their costs about their said suit in this behalf by them expended, and that they have execution therefor.

Judgment-roll signed December 5th, 1870.

EDWARD KURTZ, *Clerk.*

Damages, $5,291 67; costs, 76 90—$5,368 57.

Judgment-roll filed December 5th, A. D. 1870, at 5 o'clock p. m.
EDWARD KURTZ, *Clerk.*

Bond for supersedeas filed.

DECEMBER 14, 1870.

This day came here H. Kellogg and James B. Kellogg, of the city of Milwaukee, and filed their bond in the penalty of eleven thousand dollars, conditioned that the defendant shall prosecute a writ of error to effect, and answer all damages and costs if it shall fail to make its plea good; which bond is approved by the district judge.

Whereupon it is ordered by the court that execution be superseded; and thereupon a writ of error and citation issued, and a copy of said writ of error lodged for defendants in error, which said bond is as follows:

17 *Bond.*

Know all men by these presents, that we, Levi H. Kellogg & James B. Kellogg, are held and firmly bound unto William Lurkins, George Walls, Rickleff Tutken, and Nathan Engelmann, in the full and just sum of eleven thousand dollars, to be paid to the said William Lurkins, George Walls, Rickleff Tutken, and Nathan Engelmann, certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 14th day of December, in the year of our Lord one thousand eight hundred and seventy.

Whereas, lately, at a term of the circuit court of the United States for the eastern district of Wisconsin, in a suit depending in said court, between William Lurkins, George Walls, Rickleff Tutken, and Nathan Engelmann, plaintiffs, and The Republic Insurance Company, *was* defendant, a judgment was rendered against the said defendant, and the said defendant having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said William Lurkins, George Walls, Rickleff Tutken, and Nathan Engelmann, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said The Republic Insurance Company, shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

LEVI H. KELLOGG. [L. S.]
JAMES B. KELLOGG. [L. S.]

Sealed and delivered in presence of—

Approved by

A. G. MILLER,
District Judge.

18 DECEMBER 19, 1870.

Bill of exceptions signed and filed as follows:

Bill of exceptions.

Circuit court of the United States, in & for the eastern district of Wisconsin.

WILLIAM LURKINS, GEORGE WALLS, RICKLEF Tutken, Nathan Englemann,
vs.
THE REPUBLIC INSURANCE COMPANY.

Be it remembered that heretofore, to wit, on the 21st day of November, A. D. 1870, at the United States court room in the city of Milwaukee, before the Honorable Andrew G. Miller, district judge of the United States, in and for the said district, holding a term of the circuit court of the United States for the said eastern district, came as well the said plaintiffs, by Messrs. Emmons & Van Dyke, their attorneys, and the said defendant by Messrs. Finches, Lynde & Miller, and Mr. Robert Rae, its attorneys, and the said cause being reached for trial in its order upon the calendar, and the respective parties, by their respective counsel, having announced themselves ready to proceed with the trial of the said cause, a jury of twelve good & lawful men were called, sworn and duly empanneled; & thereupon the said plaintiffs, to maintain the
19 issue on their part, did offer to read in evidence a policy of insurance, in the words and figures following:

20 (Monogram:) R. I. C.

No. 605.] THE REPUBLIC INSURANCE COMPANY. [$5,000.

Central Office. [CUT.] *Chicago, Illinois.*

Sum insured, $5,000.

Number 605.

On account of W'm Lurkins, George Walls, Ricklef Tutken, loss, if any, payable to N. Engelmann, as his int. may appear, do make insurance and cause five thousand dollars to be insured upon the body, tackle, apparel, and other furniture of the propeller called the Belle, to engage in the gen'l lake trade, from noon of the 1st day of April, 1869, (the said vessel being warranted by the assured to be then in safety,) to noon of the 10th day of December, 1869, unless sooner terminated or made void by conditions hereinafter expressed.

Warranted by the assured to be employed exclusively in the freighting and passenger business, and to navigate only the waters, bays, harbors, rivers, canals and other tributaries of Lakes Superior, Michigan, Huron, St. Clair, Erie, and Ontario, and River St. Lawrence to Quebec, usually navigated by vessels of her class, during the portion of the life of this policy, between noon of April 1st and noon of November 30th; and between noon of November 30th and noon April 1st, ensuing, said vessel shall be laid up and safely moored, satisfactory to this company.

The said vessel, tackle, apparel, and other furniture are

valued at twelve thousand five hundred dollars, without any further account to be given by the assured to the assurers for the same. Vessel valued at $12,500.

Touching the adventures and perils which the said insurance company is content to bear and take upon itself by this policy, they are of the lakes, rivers, canals, fires, jettisons that shall come to the damage of the said vessel, or any part thereof. Excepting all perils, losses, misfortunes, or expenses consequent upon, and arising from, or caused by, the following or other legally excluded causes, viz: Damage that may be done by the vessel hereby insured to any other vessel or property; incompetency of the master or insufficiency of the crew, or want of ordinary care and skill in navigating said vessel, and in loading, stowing, and securing the cargo of said vessel; rottenness, inherent defects, overloading, and all other unseaworthiness; theft, barratry, or robbery; charges, damage or loss in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war; any claim for wages or provisions furnished to officers or crew, while the property insured may be detained by any disaster, or during subsequent repairs, excepting always services rendered in protecting, recovering, and securing the vessel or property covered by this policy; anchors being cast without being properly or sufficiently buoyed; gangways and openings through the deck being improperly or insecurely secured or protected. Policy fee, $.

The assurers hereby acknowledge the receipt of a note, due Sept. 15, 1869, 18 , for the amount of the consideration of this insurance; which, at the rate of 5 per cent. on $5,000 is $250. Rate per 5 cent. Prem. $250.

In case of loss or misfortune it shall be lawful and necessary to and for the assured, their agents, factors, servants, and assigns of the assured, to give the assurers prompt notice of the disaster, and submit the plan adopted for recovering and saving the property; and to make all reasonable exertions in and about the defence, safeguard, and recovery of the said vessel, or any part thereof, without prejudice to this insurance; and after recovery and the holding of a survey, by persons chosen by the insurers and insured, or their agents, made under oath, setting forth the particulars of actual damage received by the vessel in the disaster, and discriminating between those and former defects, and wear and tear, the insured are to cause the same to be forthwith repaired, in accordance with the surveyor's specifications; and in case of neglect or refusal on the part of the insured, or their agents or assigns of the assured, to adopt prompt and efficient measures for the safeguard and recovery thereof, or to repair the same when recovered, then the said insurers may, and are hereby authorized to, interpose and recover the said vessel, or after recovery to cause the same to be repaired, or both, for account of the insured; to the expenditures and amount whereof the said insurance company will contribute according to the proportion the sum insured bears to the valuation aforesaid, and the surplus, (if any,) paid or incurred by said insurers, (with the pre-

mium note, if unpaid,) shall be a lien upon, and shall be recoverable against, the said vessel, tackle, apparel, and other furniture, or any part thereof, or against the insured, at the option of the insurers; but in case this insurance shall be against total loss only, and no claim for same be sustained, then the whole of such expenditures and amount paid or incurred by said insurers shall be a lien, and recoverable as aforesaid; and in all cases of loss or damage, one-third new for old, shall be deducted from the amount of actual cost of repairs or estimate for same, (except on anchors,) and no partial loss or particular average shall, in any case, be paid by the insurer, unless the amount of the whole of such damage or loss (after deducting one-third new for old,) equals or exceeds five per cent. of the valuation aforesaid. Each passage, from port to port, shall be subject to its own separate average.

Particular average, § 5.

Boiler Clause.—Unless caused by stranding, collision, or the vessel being on fire, the insured warrants this policy to be free from any claim for loss or damage to boilers, steam-pipes or machinery, caused by the bursting, explosion, collapsing, or breaking of the same, and to be free from any and every general average and salvage expense in consequence thereof, excepting always the expenses of getting the vessel from an exposed position to the nearest place of safety, when further expenses of above nature are not to be a claim on these insurers.

It is agreed that the acts of the insured or insurers, or their agents, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned, and without prejudice to the rights of either party. Further, the insured shall not have a right to abandon the vessel in any case, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss, shall exceed half the amount insured, nor shall detention by the season, or by any other cause, be alleged or allowed as cause for abandoment. Moreover, no abandonment, in any case whatever, even when the right to abandon may exist, shall be held or allowed as effectual or valid, unless it shall be in writing, signed by the insured, and delivered to the said company or to their authorized agent, nor unless it shall be efficient, if accepted, to convey to, and to vest in, the said insurance company, an unincumbered and perfect title to the subject abandoned; and the valuation of said vessel, expressed in this policy, shall be considered the value in adjusting losses covered by this policy.

Losses shall be payable as soon as an adjustment is made and satisfactory proofs of the same are furnished to the company, (the amount of the premium, or note for premium, on this policy, if unpaid, and all other indebtedness due this company being first deducted.)

It is also agreed and understood that, in case of loss or damage under this policy, the assured in claiming and accepting payment therefor, hereby, and by that act, assigns

and transfers all his or their right to claim for such loss or damage as against any person or persons, to this company; to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery, paid or incurred by this company; and any act of the assured waiving or transferring, or tending to defeat or decrease any such claim against any person or persons, shall be a cancellation of the liability of this company for or on account of the loss or damage claimed, and the expenses of recovery or otherwise (if any) paid or incurred by the said company, shall be a lien upon, and shall be recoverable against, the said vessel, tackle, apparel, and other furniture, or any part thereof, or against the insured, at the option of the insurer.

Limit of insurance, $10,000.

It is also agreed that this policy shall become void if any other insurance is or shall be made upon the vessel interest hereby insured, which, together with this insurance, shall exceed the sum of ten thousand dollars.

It is also agreed that, all claims under this policy shall be void, unless prosecuted within one year from the date of the loss. And, in case the notes or obligations given for the premium herefor, or any part thereof, be not paid at maturity, the full amount of premium shall be considered as earned, and this policy becomes void, while said past due notes or obligations, or any part thereof, remain over due and unpaid.

It is also agreed that, in all cases when carrying grain cargoes in bulk, the vessel hereby insured shall have the same secured by good and sufficient shipping boards, properly and securely put in place, so as to effectually prevent the shifting of the cargo.

It is also agreed that this company may, at any time, cancel this policy, charging pro rata for the time the policy has run, and the assured may cancel by paying the customary short rates for the expired term.

The interests of the assured in this policy, or any part thereof, or in the property hereby insured, or any part thereof, is not assignable, unless by consent of this corporation, manifested in writing; and in case of transfer or termination of any such interest of the assured, or any change of the nature of the insurable interest of the assured in the property aforesaid, either by sale or otherwise, without such consent, this policy shall, from thenceforth, be void and of no effect; and no assignment or transfer shall, in any case, relieve the insured, or property hereby insured, from any or all of the conditions therein expressed, and a violation of, or non-compliance with, any of such conditions, either by the assignee or assignor, before or after the assignment or transfer, shall vitiate this policy.

Warranted by the assured not to engage in the lumber trade off the shores of Lakes Michigan & Huron, (Grand Traverse & Green Bays excepted.)

N. B.—This policy is subject to the usages and regulations of the ports of the lakes, on all matters of adjustment and settlement of losses not herein otherwise clearly speci-

fied and provided for, to be stated by a competent adjuster of marine losses, designated by the insurers.

In witness whereof the president or vice-president of the said Republic Insurance Company hath hereunto subscribed his name, and caused the same to be attested by their secretary.

April 2d, 1869.

B. W. PHILLIPS,
Vice-President.
J. R. PAYSON,
Secretary.

21 (Indorsed:) For value received, I hereby assign unto all my right, title, claim, and interest in and to the within policy.

The Republic Insurance Company, of Chicago, hereby consent to the assignment of the within policy to , subject to all conditions therein expressed.

(Indorsed:) No. . The Republic Insurance Co., of Chicago, to W'm Lurkin, Geo. Walls, Ruklef Tutken. Vessel, Prop. Belle. Valuation, $12,500; limit of insurance, $10,000; amount insured, $5,000; at 5 per cent, $250 less $, is $. Policy, $. Total, $250. Commenced at noon, April 1st, 1869. Expires at noon, 10 Dec'b'r, 1869.

[U. S. stamp, internal revenue, 50 c'ts, cancelled.]

22 And to the reading of which in evidence said defendant by its said counsel did then & there object, for the reason that the declaration claimed a joint liability to the four plaintiffs and the policy of insurance showed a liabliity, if any, to three of the plaintiffs, or a separate liability to one of the plaintiffs, but showed no joint liability to the four; and the said judge did then and there overrule said objection and allowed said policy of insurance to be read in evidence; & to which said ruling and decision of said judge the said defendant, by its counsel, did then & there except.

The said plaintiffs, further to maintain the issue on their part, called several witnesses, who were sworn and testified to facts tending to show that the propeller Belle was owned by William Lurkins, one half; George Walls, one-fourth; and Rickleff Tutkin, one-fourth, at the time the policy was issued, and that their respective interest remained the same at the time of the loss; that the propeller was burned on a trip along the west shore of Lake Michigan from Manitowoc to Milwaukee, off the north point of Milwaukee, having on board a cargo of lumber, shingles & wood, taken on board at the port of Manitowoc; that she was a total loss; that at the time the policy was issued Nathan Engelmann had a mortgage on the Belle to the full amount of the policy of insu-
23 rance; that at the time of the loss he had released Walls & Tutkin's shares of the said propeller from said mortgage, still retaining the mortgage on Lurkin's one-half interest, and upon which mortgage there remained due to Engelman at the time of commencement of suit & at the time of the trial the sum of about eleven hundred dollars, which was the extent of his interest in the policy. It further appeared that the vessel had been solely engaged during the season in the general lake trade, & only to & from ports & harbours on Lake Michigan; that the propeller was seaworthy at the time the policy issued,

And thereupon the plaintiffs rested.

And thereupon said defendant, to maintain said issue on its part, called several witnesses, who were sworn and testified to facts tending to show that the steamer Belle was not sufficiently manned at the time of the said loss or at the time she set out upon her last trip or voyage. The propeller had sailed from the port of Milwaukee with but five men on board, all told, when she should have had from twelve to fourteen men to be completely manned; that she was not seaworthy by reason thereof; that the loss was occasioned by negligence and unskilfulness of the
24 master and crew; that the pumps & hose were not in a condition to be used promptly, as required by the act of Congress; that the sheathing about the smoke-stack had warped and sprung off from the wood-work & was not in accordance with the act of Congress.

And thereupon the defendant rested.

The plaintiffs then called witnesses, who were sworn and testified to facts tending to show that five men were all that would be necessary to man the Belle on a trip from Milwaukie to Manitowoc & back; that the Belle was seaworthy when she departed from port on said voyage; that the efforts made to save the steamer were all that could be made at the time; that the fire spread so rapidly that it would have been impossible to save the steamer, & if there had been a larger crew on board it would have resulted only in a greater sacrifice of life; that the pumps, hose, & fire-engine were all in good order & ready for immediate use, & that the sheathing around the smoke-stack was in good order & in conformity to law, & in same good order & condition as when inspected by the Government inspector, & also as when inspected be the insurers (defendant's) agent prior to underwriting the policy.

25 Whereupon the objection that the parties plaintiffs were improperly joined, was renewed by defendant. The plaintiffs' counsel then asked that in case the court should be of opinion there was such misjoinder & that full recovery could be had in the names of Lurkins, Tutkin & Walls, leave be granted to strike the name of Engelmann from the record as a party plaintiff; but the court adhered to its former ruling, overruling the objection.

The testimony of the respective parties was then closed.

The court instructed the jury, inter alia, as follows:

My attention is called to the warrantee at the foot of this policy which reads as follows: "Warranted by the assured not to engage in the lumber trade off the shores of Lakes Michigan, Huron (Grand Traverse & Green Bays excepted.)"

It is claimed by the defendants that there was a breach of this warrantee. The only condition is that the insured are not to trade in lumber off the shores of Lake Michigan. This clause is in the printed part of the policy & is to be construed with the written part which reads as follows: "To engage in the gen'l lake trade." My idea is this, that they are not to engage in the carrying of lumber off shore, from one side of the lake to the other, or off shore, going into the middle of the lake,
26 where they would be out of the reach of the shore, & does not include a voyage along the shore, as this vessel ran from Manitowoc to Milwaukee. Carrying lumber is a hazardous business, on account of fire. The more lumber & shingles you put on the more liable it is to take fire. I suppose the idea of that clause in the policy is that they are not to go away from the shore in carrying lumber across the lake, but along the shore. They are prohibited from taking it off shore in any

other direction, but not along the shore. Nor does it prohibit trade from ports to harbors.

To which opinion and instruction of the court, & each & every part thereof the defendant then & there excepted.

And because none of the said exceptions so offered & made to the rulings of the said court, & to the opinions & decisions of the said court do appear upon the record of the said trial, therefore, on the prayer of the said defendant, by its said counsel, the said presiding judge of said circuit court hath to this bill of exceptions set his seal according to the statute.

A. G. MILLER. [SEAL.]

27 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America, for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file, and remaining of record in my office, being a full and complete copy of the record & proceedings in the suit of William Lurkins et al, vs. The Republic Insurance Company, as a return to the writ of error hereto annexed.

In testimony whereof I have hereunto set my hand, and duly affixed the seal of the said court at the city of Milwaukee, in said district of Wisconsin, this ninth day of January, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the United States the ninety-fifth.

[SEAL.] EDWARD KURTZ, *Clerk.*

28 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States of America, for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between William Lurkins, George Walls, Rickleff Tutken, & Nathan Engelmann, plaintiff, and The Republic Insurance Company, defendant, a manifest error hath happened, to the great damage of the said the Republic Insurance Company, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this fourteenth day of December, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth.

EDWARD KURTZ,
Clerk U. S. Circuit Court East'n Dist. Wis.

29 [SEAL.] The United States of America to William Lurkins, George Walls, Rickleff Tutken, & Nathan Engelmann, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America for the eastern district of Wisconsin, wherein The Republic Insurance Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this fourteenth day of December, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the 95th.

A. G. MILLER,
District Judge.

We admit service of above citation this 19th day of December, A. D 1870.

EMMONS & VAN DYKE,
Att'ys for Pl'ff's.

(Indorsement on cover:) No. 484. The Republic Insurance Company, plaintiff in error, vs. William Lurkins, George Walls, Rickleff Tutken, and Nathan Engelmann. E. Wisconsin C. C. U. S. Filed 16th January, 1871.